

Senator Richard Blumenthal
June 21, 2017
Questions for the Record for John Kenneth Bush

1. From 2007 to 2016, you wrote under a pseudonym on the political blog “Elephants in the Bluegrass.” Why did you choose to use a pseudonym for these blog posts?

I published my blog posts under a pseudonym to draw a distinction between my political views and my law practice. In our nation’s history, lawyers and judges have written under pseudonyms on political issues, including the first Chief Justice, John Jay, who, along with Alexander Hamilton and James Madison, published the Federalist Papers under the pen name “Publius”. Gouverneur Morris, the chief editor of the U.S. Constitution who wrote its preamble, published political writings under the pseudonym “An American”.

2. In several of your blog posts you cited to unreliable news sources to support your views. For example, you cited a piece published in World Net Daily and others written by Jack Cashill and Thomas Lifson, both noted proponents of “birtherism,” the theory that President Obama was not born in the United States. During your confirmation hearing, Senator Franken asked you if you “felt free to put posts out that cited sources that you knew were not credible.” You replied: “I’m not saying that. I’m saying that as a blogger, I was making political statements.”

- How do you vet news sources when you compose blog posts or other pieces of writing?

Because the nature of the blog was to provide fast-paced commentary upon topics in the news, rather than original research, I usually relied upon readily available sources on the internet discussing topics that might be of interest to the blog’s readership. It was my practice to review briefly and to cite any material I relied upon, to enable readers to judge for themselves the credibility of the news discussed. Given the informal nature of the commentary I provided on the blog, it was not my practice to conduct an exhaustive review of the information cited. Also, I do not recall ever reading any article from *World News Daily* or any writing of Jack Cashill or Thomas Lifson other than the specific pieces cited in my blog posts.

- Do you believe political statements should be supported by accurate facts?

That is my personal belief, but my personal beliefs are irrelevant to the position for which I have been nominated. The Supreme Court has repeatedly afforded First Amendment protection to even false statements of fact. *See, e.g., United States v. Alvarez*, 567 U.S. 709 (2012); *New York Times v. Sullivan*, 376 U.S. 254 (1964). If confirmed to the Sixth Circuit, I would faithfully apply *Alvarez*, *New York Times*, and all other controlling Supreme Court and Sixth Circuit precedents.

3. In a 2008 blog post published on “Elephants in the Bluegrass,” you wrote: “The two greatest tragedies in our country—slavery and abortion—relied on similar reasoning and activist justices at the U.S. Supreme Court, first in the Dred Scott decision, and later in Roe.” During your confirmation hearing, you tried to clarify that statement, saying: “I believe that it was a tragedy in the sense that it divided our country. There are people on

both sides, and it was a tragedy in that it has created such a division in our country.” When asked to explain the statement a second time, you replied: “The point I’m trying to make is there are millions of Americans who have a different viewpoint about Roe.”

- Do you believe that abortion is a “tragedy” in any sense other than what you described at your hearing?

My personal views are irrelevant to the position for which I have been nominated. If confirmed as a Sixth Circuit judge, I will be bound to follow all controlling precedents of the Supreme Court and Sixth Circuit concerning abortion, and I will faithfully do so.

- Do you believe that all divisive judicial decisions are tragedies? If not, what made Roe a tragedy?

Again, my personal views are irrelevant to the position for which I have been nominated. But as I explained at the hearing, *Roe* has been the subject of unique controversy and division in our country for more than 40 years. Proponents and opponents of the right to abortion have criticized *Roe* on this ground, just as I did in my blog post.

- Under what circumstances should a judge make a decision that “millions of Americans” might disagree with? Does *Roe* fit these circumstances?

My personal views about the correctness or prudence of any particular Supreme Court opinion are irrelevant to the position for which I have been nominated. If I am fortunate enough to be confirmed as a Sixth Circuit judge, my job would be to study the relevant texts and precedents, consider the arguments of the parties, and consult with my law clerks and colleagues to decide the cases presented to me.

- In Senator Feinstein’s words, before *Roe*, “women did not have access to safe, legal abortion, and some of them died.” Do you believe the pre-*Roe* status quo was also divisive to our country?

Please see my response to the first and third subparts of this Question.

- Do you believe it is a tragedy when women are unable to access safe, legal reproductive care?

Please see my response to the first and third subparts of this Question.

4. During your confirmation hearing, you said: “There are absolutely no circumstances in which I would decline to follow precedent if confirmed... I would follow *Roe v. Wade*, *Casey*, and all of the decisions that have come after that important decision.”

- Do you believe that there are any unanswered questions relevant to a woman’s right to an abortion that are not covered by existing precedent?

It would be inappropriate for me to opine on a question that could come before me if confirmed to the Sixth Circuit. See Canon 3(A)(6).

- If so, what might some of those unsettled questions be?

Please see my response to the first subpart of this Question.

5. Many important Supreme Court decisions—including *Griswold v. Connecticut*, *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Lawrence v. Texas*—rely on and reaffirm a constitutional right to privacy originating from a theory of substantive due process.

- Do you believe that the Constitution protects rights not enumerated in the text?

My personal views on this issue are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will be bound to apply all controlling Supreme Court and Sixth Circuit precedents, and I will faithfully do so.

- Do you believe the Supreme Court correctly decided that the right to privacy is an aspect of substantive due process?

My personal views on this issue are irrelevant to the position for which I have been nominated, and I have not had occasion to study *Griswold* in detail. If confirmed to the Sixth Circuit, I will be bound to apply all controlling Supreme Court and Sixth Circuit precedents, and I will faithfully do so.

- Chief Justice John Roberts said at his confirmation hearing that he believed *Griswold v. Connecticut* was decided correctly. Do you agree with Justice Roberts that this case was decided correctly?

My personal views on this issue are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will be bound to apply all controlling Supreme Court precedent, including *Griswold*, and I will faithfully do so.

- In your own words, could you explain the constitutional underpinnings to the right to an abortion?

My understanding is that the Supreme Court has located constitutional protection for the right to an abortion in the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); see also *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (applying *Casey* to regulation by the Federal government).

6. Many constitutional questions involve weighing competing interests.

- How do you weigh competing interests when both are constitutionally protected?

If fortunate enough to be confirmed to the Sixth Circuit, I would carefully review the relevant legal texts and precedents guiding such weighing of interests, consider the arguments of the parties on both sides, and consult with my law clerks and my colleagues to resolve the case.

- How do you think about assigning value to a constitutionally protected interest?

Please see my response to the first subpart of this Question above.

7. In an article you co-authored, “Eight Ways to Sunday: Which Direction, Kentucky Supreme Court?” you write about two anti-choice rulings from the 2000s, which, in your words, “provide precedent for the Court to distance itself from its perceived hostility in Leibson era towards the state’s efforts to regulate in favor of unborn life.” Do you believe that a judge should try to support a “state’s efforts to regulate in favor of unborn life”

I believe a judge should carefully review and apply the relevant legal texts and precedents, after considering the arguments of the parties on both sides and consulting with his or her law clerks and colleagues.

8. How did the Supreme Court’s decision in *Whole Woman’s Health v. Hellerstedt* clarify the undue burden standard for pre-viability abortion regulation? Under the test articulated in this decision, how would you determine whether an abortion regulation is unconstitutional?

I have not had occasion to consider the significance of *Whole Woman’s Health* in detail. If confirmed to the Sixth Circuit, I would carefully evaluate that decision in light of any other applicable Supreme Court precedents and with the assistance of briefing from the parties and counsel from my law clerks and colleagues. As with any other Supreme Court precedent, I would faithfully apply *Whole Woman’s Health*.

9. In a 2007 blog post on “Elephants in the Bluegrass,” you indicated that you supported former presidential candidate Mike Huckabee for his “no-compromise yet adroitly articulated positions,” including that he “strongly disagree[s] with [activists] on the idea of same-sex marriage.” Do you think LGBT-parties who might appear in front of you as a judge should trust that you will treat them fairly, despite knowing your publically-posted views on same- sex marriage?

If I am fortunate enough to be confirmed, I will assure all litigants that I would abide by my oath to “administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . [to] faithfully and impartially discharge and perform all the duties incumbent upon me as a [judge] under the Constitution and laws of the United States.” 28 U.S.C. § 453. Also, if I am fortunate enough to be confirmed, I will follow *Obergefell* just as I will follow every other precedential opinion of the Supreme Court.

10. In a 2016 blog post published on “Elephants in the Bluegrass,” you wrote: “The decision of who will replace Justice Scalia — and perhaps others on the high court — is the top reason why the choice between Trump and Hillary is a no brainier.”

- What did you mean by that statement?

I was articulating one reason I decided to support President Trump in the 2016 presidential election.

- What characteristics did you believe President Trump would look for in nominating a new Supreme Court Justice to replace Justice Scalia?

President Trump identified the characteristics he would look for in nominating a Supreme Court Justice to replace Justice Scalia and, in an unprecedented move, submitted a list to the American people of candidates he would consider for that replacement. I believed he would select from that list if elected, as he in fact did.

- Do you think you share those characteristics?

I was not on President Trump’s list to replace Justice Scalia.

11. In 2008, again on the blog “Elephants in the Bluegrass,” you posted a picture of a sign that read: “On 10-3 Obama supporters vandalized-trespassed and stole my Palin-McCain sign violating my 1st Amendment right to free speech. Do it again and you will find out what the 2nd Amendment is all about!!!”

- Why did you decide to publish a photo of this sign?

I thought the sign would be of interest to the readership of the blog. I understood the sign’s message to be political hyperbole and did not seriously threaten any physical harm.

- What is your understanding of the protections afforded individual homeowners under the 2nd Amendment to the Constitution?

My understanding is that the Supreme Court has held that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense,” including in one’s home. *McDonald v. Chicago*, 561 U.S. 742, 749 (2010).

12. Several times in your “Elephants in the Bluegrass” blog posts, you put the terms “climate change” and “global warming” in quotation marks, appearing to insinuate that climate change does not exist. Do you believe that human greenhouse gas emissions are primarily responsible for global climate change?

This question calls upon me to weigh in on a political debate, which I cannot ethically do as a nominee for judicial office. See Canon 5, Code of Conduct for United States Judges; *cf. also*

Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

13. In 2009, you participated in a panel discussion on originalism sponsored by the Louisville Lawyers Chapter of the Federalist Society, The Alexander Hamilton Historical Society of Kentucky, and the League of Women Voters of Kentucky. At that panel, you stated: “I would submit that from an originalist perspective that *New York Times v. Sullivan* probably wasn’t correctly decided.”

- Do you still hold this view?

Yes. I also still hold the view, which I expressed in the 2009 panel discussion, that judges should respect precedent. If I am fortunate enough to be confirmed, I will follow *New York Times v. Sullivan* and all other Supreme Court precedent.

- Were you asked about this statement at any point during your confirmation process before the June 14, 2017 hearing?

Yes.

- In February 2016, then-candidate Trump made the following campaign promise at a rally in Fort Worth, Texas: “One of the things I’m going to do if I win,” Donald Trump said last year, is “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.” Were you aware of this statement when you sought a judicial nomination?

Not as far as I am aware.

- What do you believe is meant by “open up our libel laws”? Would current doctrine allow such an ‘opening up’ to occur?

I do not know what President Trump meant by that statement.